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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 326

ESSO STANDARD OIL COMPANY, *et als.*,
Appellants,

v.

CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey,
Appellee;

HUMBLE OIL & REFINING COMPANY (formerly Esso Standard Oil Company), *et als.*,
Appellants,

v.

RAYMOND F. MALE, Commissioner, Department of Labor and Industry, State of New Jersey,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

JURISDICTIONAL STATEMENT.

Appellants appeal from the final judgment of the Supreme Court of the State of New Jersey entered by Mandate on Affirmance dated March 4, 1963, concerning which an order denying appellants' petition for rehearing was entered March 25, 1963, affirming the declaratory judgment entered September 24, 1962, by the Appellate Division, Superior Court of New Jersey, adjudicating as valid, lawful

and subsisting certain regulations promulgated by the Commissioner of Labor and Industry of the State of New Jersey, and respectfully submit this Statement to show that the Supreme Court of the United States has jurisdiction of the Appeal and that a substantial question is presented.

Opinion Below.

The opinion of the Appellate Division, Superior Court of New Jersey, is reported at 75 N. J. Super. 455, 183 A. 2d 454 (1962). The *per curiam* opinion of the Supreme Court of New Jersey, affirming on the judgment below, is reported at 39 N. J. 355, 188 A. 2d 599 (1963). Copies of these opinions are attached hereto, Appendix, *infra*, pp. 1a-25a. An earlier opinion of the Appellate Division, remanding the actions for administrative hearing, is reported at 54 N. J. Super. 260, 148 A. 2d 728 (1959). The Findings of Fact and Conclusions of Raymond F. Male, Commissioner, following the administrative hearings are not reported, but do appear in the certified record.

Jurisdiction.

These actions were brought pursuant to Rule 4:88-10 of The Revision of the Rules Governing the Courts of the State of New Jersey (1953)*, seeking declaratory judgments with respect to the validity of certain regulatory action of the Commissioner of Labor and Industry of the State of New Jersey, and praying for an injunction against the enforcement of such action. The judgment of the Supreme Court of New Jersey was entered on March 4, 1963. A petition for rehearing was denied by that Court by order entered March 25, 1963. Notice of appeal to this Court was filed in the Supreme Court of New Jersey on

* Hereinafter cited "R. R."

June 3, 1963. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U. S. C. §1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

> *Dohnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); *Bryant* v. *Zimmerman*, 278 U. S. 63 (1928); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Public Utilities Commission*, 346 U. S. 346 (1953); *Metlakatla Indian Community Annette Island Reserve* v. *Egan*, 363 U. S. 555 (1960); *Marcus* v. *Search Warrants of Property, etc.*, 367 U. S. 717 (1961).

Constitutional and Statutory Provisions Involved.

The Fourteenth Amendment to the Constitution of the United States provides:

> "* * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The New Jersey Revised Statutes provide:

> R. S. 34:1-9. "The commissioner [of Labor and Industry] shall be the appointing authority of the department and shall in accordance with the civil service laws employ such inspectors, clerks, stenographers and other personnel as he may consider necessary and shall fix the salaries of officers and employees, subject to the provisions of Title 11, Civil Service, except where otherwise provided by statute. He may assign or transfer clerks, stenographers and inspectors from one bureau to another or combine

the clerical force of two or more bureaus as may be necessary or advisable. He may require from one bureau assistance in the work of another bureau. He may abolish any office or position which in his judgment it may be unnecessary to retain.

"The organization of the department is intended to facilitate the economical and efficient performance of its work and not to impair the control or responsibility of the commissioner."

R. S. 34:1-20. "The commissioner [of Labor and Industry] may make and publish rules and regulations not inconsistent with law as he shall deem necessary to enforce the provisions of this title."

N. J. S. 34:1A-3. "The commissioner [of Labor and Industry], as head of the department, shall:

"• • •

"(e) Adopt, issue and promulgate, in the name of the department, such rules and regulations as may be authorized by law;

"(f) Formulate and adopt rules and regulations for the efficient conduct of the work and general administration of the department, its officers and employees;

"• • •"

It should be noted that the New Jersey Constitution does not contain a "due process" clause or an "equal protection" clause.

Questions Presented.

1. Whether the statutory delegation of legislative authority to an administrative official contravenes the guarantee of due process where the only standards prescribed

are: "as he [the administrative official] shall deem necessary"; "as may be authorized by law"; and "for the efficient conduct of the work and general administration."

2. Whether the proposed use of accident reporting forms in adversary litigation in which the reporting employer is a party denies to the employer thus reporting the guarantees of due process of law and the equal protection of the laws of the Fourteenth Amendment to the United States Constitution.

3. Whether the adjudication of validity of regulations failing to provide a penalty for the violation of said regulations, coupled with the availability of various penalties in the labor statutes said to be the source of authority for the regulation, including criminal sanctions, denies the due process of law guarantee of the Fourteenth Amendment to the United States Constitution.

4. Whether the conduct by the appellee of the judicially ordered administrative hearing denied to the appellants the due process of law guarantee of the Fourteenth Amendment to the United States Constitution.

Statement.

1. The Nature of the Actions and Proceedings Below.

From the enactment in 1924 of three specific statutes commonly referred to as the Accident Reporting Act (R. S. 34:15-96, -97, and -98) until 1958, the Commissioner of Labor and Industry in New Jersey had required industrial accident reports from employers only in terms of the requirements of these particular statutes. In 1958, he introduced a radically new and far-reaching accident reporting

concept by promulgating a regulation requiring the report of "• • • substantially every accident and disability." *New Jersey Manufacturers Casualty Insurance Company* v. *Holderman*, 54 N. J. Super. 260, 148 A. 2d 728 (App. Div. 1959). The industrial community promptly objected. Class actions on behalf of insurance companies, insured employers, and self-insured employers, were instituted in accordance with The Revision of the Rules Governing the Courts of the State of New Jersey (1953) in declaratory judgment actions seeking pronouncement of the invalidity of this regulation and praying for an injunction against its enforcement.

The promulgation of the regulation had not been preceded by any agency hearing. The defendant Commissioner included in his answering pleading a "record" consisting of a "statement" by the Commissioner and six brief and general affidavits by various division, bureau and section administrators. On motion of plaintiffs to strike this purported record, the matter was remanded for public hearing. *New Jersey Manufacturers Casualty Insurance Company* v. *Holderman*, 54 N. J. Super. 260, 148 A. 2d 728 (1959).

A public hearing before the defendant Commissioner followed, during the course of which the Commissioner consistently refused to allow the introduction of or to consider any "legal issues." (A typical example of this conduct may be found in the transcript of these hearings at page 46, line 12, where the Commissioner advised, "• • • I'm not going to determine any of the legal points at issue here, you've got a competent court to determine that.")

Only one procedural aspect of the administrative hearing need be here discussed. The Deputy Attorney General

appearing at the hearing as counsel for the defendant-hearing officer Commissioner introduced testimony from various department heads designed in general to show the reasonableness of and necessity for the proposed regulation. When the plaintiffs offered subordinates of these witnesses to refute such testimony, the defendant-hearing officer refused to permit these witnesses to be sworn or this testimony to be received.

Following the hearing, the Commissioner issued a "Record and Findings of Fact and Conclusions" which, in effect, found his own regulation to be reasonable. This effort also eschewed the consideration of legal issues, holding the sole purpose of the hearing to be a determination of the reasonableness of the proposed forms. The prior regulation was reiterated with little change.

The Appellate Division of the Superior Court of New Jersey, in its original jurisdiction over declaratory judgment actions of this nature, held the regulation to be "* * * valid, lawful and subsisting in all respects * * *" and denied injunctive relief. Appendix, p. 24a.

A timely appeal was taken by the plaintiffs to the Supreme Court of New Jersey. In lieu of filing an answering brief, the Attorney General, counsel for the defendant, filed a motion to dismiss the appeal, urging, in accordance with New Jersey procedure, that inasmuch as there was no dissent in the Appellate Division, appeal would lie only in the case of the showing of a substantial constitutional question. Defendant argued that there was no substantial constitutional question in the instant actions. Defendant's motion was "held" by order of the Supreme Court of New Jersey, the appeal was listed for oral argument, and was ultimately decided on the merits. The opinion of the

Supreme Court affirmed *per curiam* the opinion of the Appellate Division for the reasons expressed therein. Appendix, p. 25a.

Three aspects of the Court's opinion are notable:

First, it has held that the statutes set forth above, when "taken in the context of all other pertinent provisions" of all the statutes of New Jersey having to do with the regulation of Labor and Workmen's Compensation, prescribe sufficient standards, in connection with the problem of legislative delegation, to "accord with constitutional principles." Appendix, p. 19a.

Second, it has held that informational accident reports, provided by an employer for engineering and safety purposes to the bureau concerned therewith, may be turned over to and used by another division of the Department of Labor and Industry for "appropriate purposes" in an adversary hearing wherein the reporting employer is one of the parties. Appendix, p. 16a. No such reporting is required of the parties adverse to the employer in this type hearing.

Third, it is silent with respect to the absence of penalty provision in the regulation under attack, despite the fact that the statutes said to be a source of authority for the regulation contain a number of different penalties conceivably applicable, ranging from small monetary penalties to conviction for a crime.

2. Presentation of the Federal Question.

Foremost among the federal questions here presented is the due process issue concerning the delegation of legislative authority and the collateral examination of purported standards. The proper presentation of this question below

is best demonstrated by the fact that the Supreme Court of New Jersey, the highest Court of the State, in its adoption of the opinion of the Appellate Division (Appendix, p. 25a), has passed upon the question. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *State of Ohio*, 360 U. S. 423, 436 (1959).

The Appellate Division opinion points out that the constitutional mandate of legally sufficient standards in legislative delegation announced in the "famous decisions in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935) and *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935)" was "stressed by present plaintiffs [appellants here]." It then refuses to apply the rule of those cases, declaring that in the light of more recent authority, these decisions of the Supreme Court of the United States are "apt to wither on the vine as authorities inimical to delegative flexibility." Appendix, p. 18a.

Additionally demonstrative of the fact that the Supreme Court of New Jersey considered the federal constitutional questions presented is its treatment of the motion of the defendant in that Court to dismiss. As noted above, the rules of civil procedure in New Jersey permit appeal from the Appellate Division in civil actions as of right only when there is a dissent in the Appellate Division or when a question arising under the Constitution of the United States or the State of New Jersey is involved. *R. R.* 1:2-1. Analogously with federal procedure, state case law proclaims that in order to satisfy these requirements, any constitutional question must be a substantial one. *Starego* v. *Soboliski*, 11 N. J. 29, 93 A. 2d 169 (1952). Well aware of a purported procedural objection, the Attorney General

forewent his opportunity to file an answering brief on this appeal, and by motion sought instead a dismissal on the ground that no substantial constitutional question was presented. The Supreme Court refused to dismiss, holding the motion until oral argument and then deciding the matter on the merits.

Nor can it now be argued that this recognition of constitutional issues was limited to the Constitution of New Jersey. The only constitutional point raised by appellants with respect to the New Jersey Constitution concerned the article decreeing a separation of powers between branches of government. Were it to be argued that this was the constitutional issue being decided by the Supreme Court of New Jersey, it would require an admission that this was precisely the same *federal* constitutional issue involved in the *Panama Refining* and *Schechter* cases, expressly said to have been "stressed by [the] plaintiffs." The New Jersey Constitution has no "due process" clause.

The unconstitutionality of the contested regulation was first alleged in the initial pleadings. Assertions of repugnancy to the Constitution of the United States are to be found in the original petition in the matter of *Esso Standard Oil Company, et als.* v. *Holderman*, paragraphs 9 and 10; in the amended petition in that action, paragraphs 12 and 13; in the petition in the matter of *New Jersey Manufacturers Casualty Insurance Company, et als.* v. *Male* (here *Humble Oil & Refining Company* v. *Male*) filed subsequent to the administrative hearing and in which the present appellants were among the plaintiffs, paragraphs 10 (o), (p), (q), (y), (bb) and (dd) as incorporated in paragraph 12 (a), and paragraph 12 (l). From the stand-

point of pleading, the constitutional issues have been an obvious and major part of the litigation from the beginning.

As noted above, plaintiffs were affirmatively denied the opportunity to present constitutional issues at the administrative hearing to which the issues were remanded. The Commissioner, as hearing officer, consistently refused to consider that which he conceived to be "legal issues." In this regard, the attention of the Court is respectfully invited to references from the transcript of the administrative hearing as follows: p. 46, line 12, quoted above; p. 297, line 6, "• • • I am not here certainly to decide the question of legalities." Particularly revealing in this context are the statements of the Commissioner appearing at p. 1210, line 19 and p. 1219, line 19 of the transcript. The plaintiffs were cross examining a witness of the defendant who is a Deputy Director of the Division of Workmen's Compensation, a subordinate Division of the Department of Labor and Industry. The witness had testified that he had been a member of a committee which studied, among other things, the need for and design of the forms contemplated by the questioned regulation. He related that in the course of this committee work he had agreed with recommendations of an independent study made previously by an individual. He was asked on cross examination whether this agreement with the prior study included a concurrence with the recommendation of that study that a statutory change was necessary. An objection to this question was sustained, the Commissioner saying, "I think that it has been agreed from the very first day of the hearing that we are not here in this room to determine legality. • • • It is not my function. I said I have no competency to determine that." Transcript, p. 1210, line 19. Later he added, "The legal issues,

the statutory basis here or any other statutory jurisdiction that you may wish to question, I am sure will be proper to consider when the Attorney General is before the court. That is not something which I feel I have competence, nor is it my province." Transcript, p. 1220, line 1.

The adamancy of this position was well demonstrated by the determination of facts and conclusions which followed the hearing. These candidly announced that the "sole purpose" of the administrative hearing was to determine "on an administrative level the reasonableness of the forms • • •." *Findings of Facts and Conclusions of Raymond F. Male, Commissioner*, p. 2, 1st full paragraph.

Plaintiffs were required to present the substantial federal constitutional questions to the Appellate Division in a legal and factual vacuum, so to speak. The Commissioner at the hearing would not listen.

Such a presentation was made, nonetheless, both to the Appellate Division and to the Supreme Court on review. Counsel for the appellants have requested that all briefs before both Courts be included in the record. Notice of Appeal, p. 4.

Without belaboring the matter, in view of the actual determination of the question by the New Jersey Supreme Court as pointed out above, it should be noted that the first point presented in the Appellants' brief before the Appellate Division complains against the lack of due process by virtue of the failure to circumscribe this purported delegation of legislative authority by constitutionally adequate standards. This is the stressing of the doctrine of the *Panama Refining* and *Schechter* cases noted and rejected by the New Jersey Courts. The first three stated

questions in the Statement of Questions Involved in the brief before the New Jersey Supreme Court pointedly raised the constitutional issue of standards in purported legislative delegation. Plaintiffs' Brief Before New Jersey Supreme Court, p. 1.

All other constitutional objections presented here were also raised no later than at the administrative hearing.

There the plaintiffs complained in depth of the proposal of the Department to use informational reports, said to be required for engineering and safety purposes, as admissions against the interest of the reporting employer in workmen's compensation hearings—an adversary proceeding—held in another subordinate agency of the Department of Labor and Industry different from the Bureau of Engineering and Safety. An entire section of the brief before the Appellate Division was devoted to this complaint. Plaintiffs' Appellate Division Brief, Point VI-B, p. 190 *et seq.* Due process objections were specifically stated. *Ibid.* p. 194. Inasmuch as no regulation required like reports from the party adverse to the reporting employers in the workmen's compensation hearings, the denial of equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States was specifically charged. *Ibid.* p. 194. This federal constitutional issue was also expressly decided. Despite the recognition of the New Jersey Courts that such reports were "informational reports" (Appendix, p. 16a), they could conceive of "no possible objection" to the "concomitant use of the information contained therein for the appropriate purposes of any other agency [than the Bureau of Engineering and Safety with which this particular form is filed] in the Department." Appendix, p. 16a. The use of the forms "in prosecution of a formally litigated

claim" against the reporting employer is contemplated. Appendix, p. 22a. The record amply supports, and we are certain it will not and cannot be disputed, that the Workmen's Compensation Division is an "other agency in the Department," and that among its functions is the conduct of adversary hearings in most of which the reporting employers are a party.

At the administrative hearing the plaintiffs inquired in vain to discover what penalty might be imposed for noncompliance. The regulation itself imposes none. Other statutes, among those which "in context" were later held to be the fountainhead of the Commissioner's ostensible authority in this regard, impose numerous and differing penalties, including criminal sanctions, for non-reporting of accidents in accordance with certain specific statutes. (*E.g.* R.S. 34:15-101, R.S. 34:1-53, R.S. 34:6-98.9 (b), R.S. 26:4-41.) Neither the administrative officials at the hearing, nor the Court later, offered any assistance. Typical of the hearing evidence in this regard was the testimony of Thomas L. Franklin, Acting Director of the Division of Workmen's Compensation. He suggested the imposition of any sanction " • • • appropriate and available to the Commissioner." Transcript, p. 2311, line 18. He then suggested one particular sanction. Transcript, p. 2311, line 22. He concluded by warning that if anyone believed the sanction he had suggested "• • • was exclusive, I would like to disabuse the record of that fact." Transcript, p. 2312, line 23. The constitutional problem thus engendered was specifically raised in the Appellate Division brief. Plaintiffs' Appellate Division Brief, p. 125 *et seq.* It was reiterated in the brief before the Supreme Court of New Jersey. Plaintiffs' Supreme Court Brief, p. 73 *et seq.* The opinion below is silent with respect to the problem.

It was repeated, precisely and succinctly, in plaintiffs' Petition for Rehearing to the Supreme Court of New Jersey (Point II, p. 4 *et seq.*), to no avail. Appendix, p. 30a.

With final respect to presentation of the federal constitutional questions, the due process objections of the plaintiffs to the essential unfairness of the administrative hearings are to be noted. One example will suffice: the Attorney General, representing the Commissioner of Labor and Industry who was both defendant and hearing officer, presented the heads of several subordinate bureaus and divisions of the Department to testify with respect to needs and reasonableness. He also presented several chosen subordinates. Transcript, pp. 48, 132, 584, 1151, 1309, 1394, 1420, 1785, 1794, 1949, 1985. The plaintiffs subpoenaed and called employees of the various departments to refute the testimony thus presented by the Commissioner. The Commissioner refused to permit these witnesses to testify, and in fact, noted his ruling would apply to any offer of any of "• • • the approximately three thousand employees of the Department of Labor and Industry." Transcript, p. 2924, line 11. The constitutional objection was noted at length in plaintiffs' Appellate Division brief, and thus raised before that Court:

> "In sum, the Commissioner, as a defendant, enjoyed every latitude. In addition to selecting the formal procedure, he was allowed to introduce matter without limitation. Following this, the plaintiffs' opportunity for impeachment was reduced to a minimum when they were refused the opportunity to examine the source. • • •" Plaintiffs' Appellate Division Brief, Point V-C and D, p. 187.

The objection was again raised in the Supreme Court. Plaintiffs' Supreme Court Brief, p. 78. The opinion below is silent with respect to this objection.

The Questions Are Substantial.

1. The Standards Question.

It is beyond question that at one time it was thought the rule making power of the legislature could not be delegated to administrative authority without adequate and definitive standards to guide the administrator's action. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935). To do otherwise offended due process.

The Supreme Court of New Jersey has held in this case that these important decisions are "• • • in the opinion of competent students, • • • apt to wither on the vine as authorities inimical to delegative flexibility." Appendix, p. 18a. It arrived at this conclusion by the sole federal support of two subsequent decisions of the Supreme Court of the United States, the broadness of each of which was candidly stated to be a wartime exigency. *Yakus* v. *United States*, 321 U. S. 414 (1944); *Lichter* v. *United States*, 334 U. S. 742 (1948).

Acting accordingly, the Supreme Court of New Jersey has approved a delegation of rule making authority to the Commissioner of Labor and Industry circumscribed, in effect, only by the standard of the judgment of the administrator. Literally set forth, the standards said to be adequate confine the Commissioner only to that which "he shall deem necessary" (R. S. 34:1-20), "for the efficient conduct of the work and general administration of the department, its officers and employees" (N. J. S. 34:1A-3(f)). An additional catchall of "as may be authorized by law" appears. (N. J. S. 34:1A-3(e).)

The substantiality of the complaint of plaintiffs does not rest on enormity of action. The plaintiffs have com-

plained at the proper time and at the proper place of that which they believe to be unreasonable and arbitrary. Admittedly a contrary finding below has concluded that issue. Plaintiffs submit, however, that the details of the administrative action are, in a relative sense, unimportant. As said in *Panama Refining* v. *Ryan, supra,* at p. 430:

> "The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

The substantial issue to be here decided is whether an administrative official is constitutionally able, under guise of a "flexibility" doctrine of legislative delegation, to impose his whim upon those subject to his control. The substantiality is reflected in the breadth of standards deemed to permit any action thought by the administrator to be useful.

"Power," Madison noted, "is of an encroaching nature, and * * * it ought to be effectively restrained from passing the limits assigned to it." *The Federalist XLVIII, Universal Classics Library Ed.,* Vol. 1, p. 338.

The Supreme Court of New Jersey not only has avoided the application of such restraint, but has sanctioned its antithesis. It has permitted the standard to be set by him upon whom the standard should be imposed.

Remarkably akin factually to the "* * * roving commission to inquire into evils and upon discovery correct them" of the *Schechter* case, the assumed power in the instant actions, confined as it is only by the judgment of the administrator, is certainly the "delegation running riot" of that same case.

The insidious nature of such a standard has been condemned before. It can well be described as one of "'* * *

no fixed principles, and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice • • • unknown to our constitution and laws; • • • [it would be] destructive of the rights of the citizen, and an intolerable tyranny. Let the power once be established, and there is no knowing where the practice under it would end.'" *Jones* v. *Securities and Exchange Commission*, 297 U. S. 1, 27 (1936), quoting from *In re Pacific Ry. Comm.*, 32 F. 241.

If such standard is permitted constitutionally to control legislative delegation, the long-cherished "government of laws and not of men" (*Anheuser-Busch* v. *Walton*, 135 Me. 57, 190 A. 297, 301 (1937)) must eventually disappear. This question is as substantial as that.

2. The Illegality of Proposed Departmental Use of Forms.

The proposed regulations require all employers in the State of New Jersey to furnish detailed information with respect to substantially all accidents and occupational injuries. Testimony was received from each of the subordinate agencies in the Department of Labor and Industry to indicate the areas of particular need in each for certain of the information. General use by all subordinate agencies of all the information, regardless of "need," is now proposed. It was frankly admitted at the hearing that such use would make available to the hearing officer in contested workmen's compensation cases in the Workmen's Compensation Division of the Department of Labor and Industry all reports thus filed by the reporting employer. This availability of extra-evidential material to a hearing officer in a contested proceeding between employer and employee was condoned by the New Jersey Courts. "Presumably the report [L&I-1, essentially an engineering and safety report] will be made available for purposes

of administration of the Workmen's Compensation Act and other agencies in the Department, although required to be first filed with the Bureau of Engineering and Safety." Appendix, p. 8a. The opinion below encouraged the use of certain of the forms "* * * in prosecution of a formally litigated claim." Appendix, p. 22a. Without regard for the considerations of essential fair play, the real touchstone of due process, the use of extra-evidential material by hearing officials is universally condemned as a patent violation of due process. *Gonzales* v. *United States*, 348 U. S. 407 (1955). Compare the "cherished rights" of *Greene* v. *McElroy*, 360 U. S. 474 (1959). If the New Jersey Courts are correct, an employer must suggest to its employee the existence of a claim against the employer, must furnish the employee with an investigation to be used "in prosecution of [the] claim," and must face the prospect of being confronted in adversary litigation with evidence it has been required to prepare for the adverse party. As a final constitutional indignity, it appears that the information thus supplied might well be used at the time of the hearing without the knowledge of the employer, since it will, as a matter of course in every case, be included in the hearing officer's file.

It should also be noted that there is no correlative obligation imposed upon the employee, the adverse party in the litigation. The problem is also one of equal protection.

As indicated in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 420, "The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute." As pointed out in the dissent in *United States* v. *Sharpnack*, 355 U. S. 286, 299 (1958), "[C]onvenience is not material to the constitutional problem."

The present controversy, as in the *Panama Refining* case, relates to that which appears to be a simple delegation

of rule-making authority; the basic question has a much wider application.

3. The Question of Penalty.

The controverted regulation provides no penalty clause. Officials of the Department of Labor and Industry have contended that penal sanctions are available from all the statutes controlling labor and workmen's compensation. These statutes, as noted above, make available various and different penalties for noncompliance with specific provisions in which particular accident reports or other informational reports are required. The administrator refused to advise with respect to the sanction to be applied. The Court was silent as to the problem.

As suggested to both the Appellate Division and the Supreme Court below, it is respectfully submitted here that to force an employer to risk imprisonment in order to determine the application of a law violates the first essential of due process of the law. *Connally* v. *General Construction Company*, 269 U. S. 385 (1926). Cf. *United States* v. *Eaton*, 144 U. S. 677 (1892); *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407 (1908).

4. Essential Unfairness in the Hearing.

As detailed above, at the administrative hearing, plaintiffs offered the testimony of a number of employees of the Department of Labor and Industry designed to refute testimony from other employees previously called by defendant's counsel. The defendant-hearing officer sustained his counsel's objection to this offer and refused to receive testimony from these or any other employee of the Department. This typical conduct was certainly less justifiable than that condemned in *Morgan* v. *United States*, 304 U. S. 1 (1938), and warrants the protection of plaintiffs by this Court.

Conclusion.

It is respectfully submitted that this Court has jurisdiction in this appeal, that the federal constitutional questions were properly raised and presented below and were decided below, and that the questions are so substantial as to require plenary consideration by this Court.

Respectfully submitted,

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John W. Fritz
Attorneys for Appellants

APPENDIX.

Opinion of Appellate Division.

Superior Court of New Jersey

APPELLATE DIVISION.

A-60-58; A-68-58; A-995-59.

ESSO STANDARD OIL COMPANY, *et al.*,
Plaintiffs,
vs.
CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY, *et al.*,
Plaintiffs,
vs.
CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY, *et al.*,
Plaintiffs,
vs.
RAYMOND F. MALE, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

Civil Action.
Opinion.

Argued January 29, 1962—Decided July 12, 1962.

Opinion of Appellate Division.

The opinion of the court was delivered by CONFORD, S. J. A. D.

These are consolidated declaratory judgment proceedings brought in this court pursuant to R. R. 4:88-10 attacking the validity and reasonableness of certain orders of the late Commissioner of Labor and Industry, Carl Holderman, revising the requirements for the reporting of industrial accidents and compensable occupational diseases. Plaintiffs sue as representatives of affected insurance companies carrying workmen's compensation liability coverage, insured employers and self-insured employers. This court heretofore settled the procedure for the making of the record herein in *New Jersey Mfrs. Cas. Ins. Co.* v. *Holderman*, 54 N. J. Super. 260 (App. Div. 1959), wherein a fuller description of the background of this action will be found. Subsequently, Commissioner Holderman died, and Commissioner Raymond F. Male assumed office as his successor. He conducted the hearings ordered by this court at various times between December 15, 1959 and February 26, 1960, in the course of which there was amassed a record of testimony and exhibits which, together with the findings and other pleadings in this matter, comprises a printed record of almost 3,000 pages. At the conclusion of the hearings the Commissioner filed his "Findings of Fact and Conclusions," wherein he determined that the prescribed forms and regulations were reasonable and necessary for the conduct of several agencies in the Department, but ordered certain modifications to accord with what he found to be constructive suggestions and views by both sides during the hearings.

The processing of this litigation and its submission to the court were unfortunately delayed not only by the circumstance of the transition of official responsibility in the office of the respondent, but also by illnesses and substitutions of counsel on one side or the other and negotiations

for settlement of the dispute which it was represented to the court during the proceedings promised a fair prospect of success. While it appears that substantial concessions were made by the respondent to meet the objections of plaintiffs, the latter remain basically dissatisfied, as indicated at argument, in two substantial respects: (1) the requirement for submission of medical information and diagnoses to the Division of Workmen's Compensation and to injured employees; and (2) the requirement, as to self-insured employers, for early initial reporting of accidents, *i.e.*, at the same time as insured employers, in place of the requirement in R. S. 34:15-97, which calls for reporting immediately upon knowledge of an accident (or compensable occupational disease) causing disability extending beyond the seven-day waiting period or any permanent injury.

The final adoption by Commissioner Holderman of the revised forms of accident reporting on October 1, 1958 was preceded by a long period of study and analysis within the Department of Labor and Industry, as well as of consultation and exchange of viewpoints with representatives of employers and insurance carriers, beginning early in 1956, when the Commissioner enlisted the advice of Dr. Monroe Berkowitz, a member of the faculty of the Department of Economics of Rutgers University, relative to improvement of administrative procedures in various divisions and bureaus of the Department of Labor and Industry, particularly as to the processing of workmen's compensation claims. Dr. Berkowitz made three reports to the Department on the subject, the last on July 12, 1956. He found many of the procedures antiquated, inefficient and functionally obsolete, particularly in respect of record keeping, filing and cross-referral both in the Division of Workmen's Compensation and in other agencies in the Department concerned with matters of worker welfare, safety and accident statistics. He made specific recommendations, including the basic substance of the accident report forms now in controversy.

In part, however, these were designed to reduce or eliminate unnecessary or duplicative reporting of accidents or of information relating thereto by employers and insurers.

The recommendations were studied by administrative officials in the Department with a view toward regulatory implementation, consultants including key personnel in the Division of Workmen's Compensation and representatives of agencies having responsibility for safety and industrial accident prevention, rehabilitation of injured workers, accident statistics, and supervision of laws concerning the welfare of female and minor workers. There was a consensus that earlier reporting by self-insured employers, reorganization of the information on the forms, and the expanded medical information required would subserve better administration of statutory objectives, particularly in the Division of Workmen's Compensation and the Bureau of Engineering and Safety. See *infra*. While no formal or public hearings were conducted by Commissioner Holderman relative to the adoption of the proposed new accident reporting requirements, it is indubitable that all representative industry, employer and insurance groups or associations were consulted in advance of promulgation, their views solicited, and some of their suggestions reflected in the content of the forms finally adopted by him.

In view of the substantial narrowing of the dispute herein at argument to the two basic new requirements of the revised report forms, as noted above, we find it unnecessary to catalogue in detail the various types of reports required before and after the directive under review. Previously, the reports required substantially accorded with the specifications of R. S. 34:15-96 to 102, inclusive (sometimes referred to as the Accident Reporting Act). It will be helpful here to set forth the full text of this statute (for ease of identification we supply the revisers' headings):

"34:15-96. *Reports of accident*

Every employer carrying insurance as required by article 5 of this chapter (§34:15-70 *et seq.*) shall

make report in accordance with the terms of his insurance policy upon the happening of any accident or the occurrence of any compensable occupational disease in his establishment. Such report shall be prepared in triplicate upon a form, designated as 'first notice of accident', to be furnished by the insurance carrier. One copy shall be sent to the department of labor, one copy to the insurance carrier, and one copy shall be kept on file by the employer. A supplemental report shall be prepared on a form designated as 'supplemental report', and sent in like manner, at the expiration of the waiting period prescribed by section 34:15-14 of this title. If, however, the employee is able to resume work before the expiration of the waiting period, the supplemental report shall be sent immediately upon his return. Thereafter the employer shall promptly furnish the carrier the information demanded and necessary to enable it to carry out the intent of this chapter. These reports on the first notice and supplemental forms, filed with the state, must be signed by the employer and mailed by him directly to the workmen's compensation bureau, as a check on the operations of the insurance company."

"34:15-97. *Report by employer not carrying insurance*

An employer not carrying compensation insurance shall make report of any accident or compensable occupational disease causing a disability extending beyond the waiting period or causing any permanent injury. The report shall be prepared and sent immediately upon the employer's having knowledge of the disability or injury named above, and shall be made out in duplicate upon forms to be secured from the workmen's compensation bureau.

One copy shall be mailed to the bureau and one copy kept on file by the employer. Within three weeks after the accident, or the obtaining of knowledge of compensable occupational disease, the employer operating under article 2 of this chapter (§34:15-7 *et seq.*), shall send to the bureau a second report, containing a statement of wages and an agreement to care for the case according to the terms of the compensation law. This form shall be signed by the employee as provided thereon and by the employer. Immediately upon the employee's recovering so as to be able to resume work, the employer shall file with the bureau a final report, setting forth the length of disability, the nature and extent of permanent injury, if any, and the compensation payable for each. This form shall also be signed by the employer and the employee."

"34:15-98. *Report by insurance carrier*

Every insurance carrier writing workmen's compensation insurance in this state shall make report of accident, or compensable occupational disease, as follows: Immediately upon receiving knowledge of an accident to an employee, or the contracting of a compensable occupational disease, causing a disability extending beyond the waiting period or causing any permanent injury, the company insuring the employer of such employee, shall at once make report to the workmen's compensation bureau on a form prescribed by the bureau. Within three weeks after the carrier has learned of the accident or the contraction of such disease, such carrier shall send to the bureau a second report containing a statement of wages and an agreement to care for the case according to the terms of the compensation law. This report shall be signed by the employee as provided thereon and by the employer or insurance

carrier. Immediately upon the carrier's learning that the employee has recovered so as to be able to resume work, the carrier shall prepare a final report, and take the steps necessary to have it signed by the employee, as provided thereon. This form shall also be signed by the employer or carrier and sent to the bureau as promptly as possible. When an employee refuses to sign any of the required forms, that fact shall be noted on the blank at the point where the signature should be placed, and the forms filed with the bureau. These forms shall be fully prepared before presentation to the employee for his signature. It shall be unlawful to request or direct any injured employee to sign blank forms to be later filled out and filed with the bureau."

"34:15-99. *Report not public*

The first reports of accidents filed with the workmen's compensation bureau, shall not be made public, and shall not be open to inspection unless, in the opinion of the commissioner of labor, some public interest shall so require, and such reports shall not be used as evidence against any employer in any suit or action at law brought by an employee for the recovery of damages."

"34:15-100. *Medical reports*

As a part of the necessary medical service required by the compensation law, the employer or insurance carrier shall, when directed so to do, file with the workmen's compensation bureau copies of such medical certificates or reports as it may have on file."

"34:15-101. *Penalty for noncompliance*

Every employer, insurer or other person failing to comply with the terms of this article shall, for each offense, be liable to a penalty of not less than ten nor more than fifty dollars, the amount thereof to

be determined by and paid to the commissioner of labor. Upon refusal to pay such fine, the same shall be recovered in an action at law by the commissioner of labor in the name of the state of New Jersey."

"34:15-102. *Rules and regulations; agreements filed*

The workmen's compensation bureau is authorized to make such rules and regulations as may be necessary to carry out the purpose of this article and the bureau is hereby directed to keep on file the agreements filed with it for a period of eight years. Any agreement, however, covering a period greater than eight years shall be kept on file for the full term of the agreement."

I

We address our attention first to the objections by the self-insurers to the reports required to be made by them under the order complained of. Preliminarily, we note that between 13% and 15% of all workers in the State are employed by self-insured employers. Essentially, the objection is to the earliness of the initial report, designated by the revised order as form L & I-1, required of both insured and self-insured employers. This must be filed with the Bureau of Engineering and Safety no later than the start of the second workday after injury occurs, except that in case of a fatal or serious injury (one that requires hospitalization) it must be filed immediately. It is required in all cases where the injury causes a loss of time from regular duties beyond the working day or shift on which the accident occurred, or where medical treatment beyond ordinary first aid is required (or where an occupational disease exists whether or not time is lost). Presumably the report will be made available for purposes of administration of the Workmen's Compensation Act and other agencies in the Department, although required to be first filed with the Bureau of Engineering and Safety.

The contrast between the foregoing requirement and that imposed upon self-insured employers under R. S. 34:15-97 is clear insofar as degree of seriousness of an accidental injury is concerned, but not so clear in relation to time of reporting. The statutory report is to be sent "immediately" upon the employer's having knowledge of an accident causing any permanent injury or causing disability beyond the waiting period. Obviously, depending upon the employer's unilateral appraisal of the seriousness of the accident and his good faith in discharging his statutory obligation, many accidents which should be reported at once by an uninsured employer may not be. Clearly, the seven-day waiting period is not necessarily required to pass before an employer knows that because of the seriousness or nature of the injury there will be a disability lasting beyond the waiting period. Moreover, it appears from the proofs that where accidents which should be reported eventually (under the statute) are not reported at once, they may in some cases be withheld from report indefinitely or entirely, thereby promoting the likelihood that injured workers might not receive the full amount of compensation due them, whether in the form of medical treatment, or temporary or permanent disability awards.

According to the testimony of former Director of the Division of Workmen's Compensation, Ned J. Parsekian, under the heretofore reporting practice by self-insured employers precisely such abuses obtained. He testified:

> "Q. Mr. Parsekian, do you know of any instances where an employee was involved in an accident, an employee of a self-insured employer was involved in an accident which caused a disability exceeding seven days, or which caused permanent injury, where an accident report form was not filed by the self-insured employer? A. Many such cases were reported to me as Director, where serious injuries

were incurred by workers on the job and no report was furnished of any kind to the Division.

Reports came to me as Director from the staff that people with serious injuries, such as fractured legs or arms, wheel chair cases, were brought to work by taxi or chauffeur, so that they would not register a day lost and it would not be necessary, under the rules, to report that there was a loss time injury to the Division."

Thus the administrative requirement of early reporting of all accidents of a specified objective degree of severity serves a self-policing function in assuring the filing in all compensable cases of the information specified by the statute.

There was also testimony that early reporting of the basic facts of an accident is more apt than later reporting to accurately memorialize all the pertinent information relating thereto for any of the proper purposes of the interested agencies of the Department.

Under the social philosophy underlying Workmen's Compensation legislation in this state the Division is not a mere quasi-judicial tribunal confined to the duty of deciding formally litigated claims. It is properly expected to take the initiative where necessary to assure the prompt and full provision for injured workers of all the statutory benefits to which they are entitled in a given case. In his comprehensive work, "Workmen's Compensation—The New Jersey Experience" (1960), Dr. Berkowitz quotes Max D. Kossoris (at p. 96) to the effect that " 'the primary objective of administration [of a compensation act] is to make sure that the law is observed and that an injured worker gets everything to which the law entitles him.' " (Kossoris, "An Appraisal," in *Workmen's Compensation in the United States*, U. S. Dept. of Labor, Bur. of Labor Statistics, Bull. No. 1149, 1954, p. 3). This object is the purpose of R. S.

34:15-50 which provides that settlement agreements between employers or insurance carriers and injured employees must be filed with the Division and are not binding on the parties unless approved; and that if an approved agreement has not been filed within 21 days after an injury the Division shall itself "endeavor to bring about a settlement of the pending claim." It may investigate why a settlement has not been effected, and, with the consent of the worker, may itself file a petition for compensation on his behalf. *Ibid.*

The Division (and its predecessor Workmen's Compensation Bureau) has long maintained an active program for informal resolution of compensation claims. More recently it instituted a system for review of direct settlements which has resulted in disclosures of many substantially inadequate settlement proposals. Material increases in such settlements resulted from the exercise by the Division of its statutory authority in this regard. The information in the accident report forms is properly used and usable against the parties not only in these settlement review proceedings and in the course of informal hearings looking to settlements (providing the parties are made aware thereof) but as admissions in formal hearings of litigated claims. See *Miller* v. *National Chair Co.*, 127 N. J. L. 414 (Sup. Ct. 1941) affirmed o.b. 129 N. J. L. 98 (E. & A. 1942); *Amend* v. *Amend*, 12 N. J. Super. 425 (Cty. Ct. 1950). The proofs in the case before us justify the inference that early filing of initial accident reports conduces appreciably to effectuating proper and adequate settlements and preventing approval of improper ones, considering the factors both of better assurance of availability of any reports from the employer at all (see *supra*) and greater likelihood of accurate and complete information when fresh in relation to the event.

Statutory authority for the regulations under review insofar as they are related to administration of the work of any agency in the Department is clear (we consider

infra the contention of plaintiffs that the Accident Reporting Act is exclusive of any authority in the Commissioner to make other reporting requirements). R. S. 34:1-20 provides: "The commissioner may make and publish rules and regulations not inconsistent with law as he shall deem necessary to enforce the provisions of this title." N. J. S. A. 34:1A-3, which derives from the act reorganizing the Department of Labor and Industry as now constituted (L. 1948, c. 446) provides that, "The commissioner, as head of the department, shall * * * (e) Adopt, issue and promulgate, in the name of the department, such rules and regulations as may be authorized by law; (f) Formulate and adopt rules and regulations for the efficient conduct of the work and general administration of the department, its officers and employees." Insofar as concerns the referral of the L&I-1 reports and information contained therein from the Bureau of Engineering and Safety to the Division of Workmen's Compensation or other agencies for use there, this is authorized under R. S. 34:1-9, which gives the Commissioner power to utilize one bureau in assisting the work of another.

As to agencies of the Department of Labor and Industry other than the Division of Workmen's Compensation whose functions are asserted to be aided by the more comprehensive and timely accident information afforded by form L&I-1, we find, first, considerable testimony based upon the activities of the Bureau of Engineering and Safety. This agency administers the safety codes in manufacturing, construction trades and mines, which, collectively, comprise a large segment of accident-producing industry. By virtue of reorganization of the Department under L. 1948, c. 446, and administrative action pursuant thereto, there has been delegated to the Bureau a wide jurisdiction in inspection and similar services and functions as a result of which it has a continuous interest in promotion of industrial safety.

The analysis of causes of industrial accidents is a fundamental area of its administrative concern. The predecessor of form L&I-1, not previously available from self-insured employers, has been the only regular source of current notification of serious accidents available to that bureau. The head of the agency testified: "What we need are criteria that refer to correctable unsafe conditions, and the WC-1 form [same as L&I-1] report can be a clue to such a condition, and it may be a clue without regard to whether or not the injury in that particular case was a serious one. When the new criteria are established, we hope to include investigations of injuries which may have been minor, but where the fact that they were minor rather than major was [an] accidental occurrence in itself. These might be classified as a 'near miss accident.'" He said that in the kinds of accidents he would be interested in investigating (not necessarily correlative with the seriousness of an injury) the factory inspector should be notified the same day, and any investigation later than 10 days after the accident would not be likely to be valuable. Since at least 13% of workers are in self-insured industry, availability of timely accident information in that field was regarded as necessary for study of industrial accidents on an over-all basis.

Other testimony given on behalf of the State involved the relationship of prompt and adequately detailed accident reports to the work of the Wage and Hour Bureau, especially in relation to female and minor workers, to the Bureau of Records and Statistics, and to programs looking toward rehabilitation of injured workers. In all these respects, and perhaps others, as well as in relation to the statutory duty of the Commission to *report annually* to the Governor as to the work of his department, R. S. 34:1-19, there is established to our satisfaction a *prima facie* reasonable relationship between the accident reporting requirements here under attack and the proper performance by

the Commissioner and the agencies under his jurisdiction of their statutory duties and obligations, so as to justify the conclusion that he had the statutory power to promulgate the requirements under R. S. 34:1-9 and N. J. S. A. 34:1A-3 (e) and (f), taken in the context of all other pertinent provisions of Title 34.

Plaintiffs' major reliance for their thesis of illegality of the timing of the L&I-1 form in respect of self-insured employers, as noted, is that the Accident Reporting Act constitutes a specific regulation on the subject by the Legislature, preempting the field to the exclusion of jurisdiction thereof by the Commissioner through rules and regulations. The doctrine invoked is "*expressio unius est exclusio alterius.*" We do not, however, regard that rule of statutory construction as controlling here. At best, it is only an aid towards construction, always to be used with "great caution." *Gangemi* v. *Berry*, 25 N. J. 1, 11 (1957). The provisions in question date from L. 1924, c. 187. (Accident reporting statutes in this State go back to L. 1904, c. 64, §28.) Whatever the extent of the actual use of the forms filed pursuant thereto by the Division (and its predecessor Workmen's Compensation Bureau), it would not appear that by adoption of this act the Legislature intended anything more than minimum requisites for assurance of at least a degree of supervision by the State of compliance by employers and insurance companies with the Workmen's Compensation Act. Section 34:15-96 tends to show this by leaving the contents of the report by insured employers to the requirements of the policy, the form to be supplied by the carrier. The supplemental report is to be supplied at the expiration of the waiting period, or immediately if the worker resumes work earlier. Copies of the reports are required sent to the workmen's compensation bureau "as a check on the operations of the insurance company."

It is not reasonable to believe that the Legislature intended, by the enactment of requirements such as these,

or of the companion section dealing with self-insured employers (R. S. 34:15-97), that if in the course of its expanding and ongoing experience in administration of the act, as for example in reference to supervision of or inducing settlements pursuant to R. S. 34:15-50, the compensation bureau deemed it useful to have available fuller or earlier reports (within the limits of reasonableness) better to perform its statutory duties, the rigid, fixed specifications of the statute should stand in its way.

Plaintiffs contend that *Massie* v. *Court of Common Pleas of Monmouth*, 8 N. J. Misc. 600 (Sup. Ct. 1930), affirmed o. b. 108 N. J. L. 199 (E. & A. 1931), holds that the provisions of the Accident Reporting Act are exclusive of the regulatory jurisdiction of the Department. We do not so read the opinion. No such problem was presented. All the case held was that one of the sanctions then contained in the act for non-compliance-preclusion of plea of limitations—was enforceable against the employer when no report was filed after knowledge of injury (that sanction was subsequently repealed).

But if, perchance, a more stringent viewpoint as to the legislative intent were deemed to require us to foreclose enforced reporting to *the compensation Division* by self-insured employers in any manner other than specified by the Accident Reporting Act, no such conclusion can reasonably be reached in respect of administrative requirements for reporting information as to accidents to or on behalf of other agencies of the Department, such as the Bureau of Engineering and Safety, deemed necessary for the more efficient performance of their administrative duties. Certainly the Legislature never intended its enactment of the Accident Reporting Act to have restrictive effect on the adoption by the Department of regulations pertinent to industrial safety, accident prevention, rehabilitation of injured workers, collection and promulgation of statistics

for report to the Governor and Legislature, and the like. Form L&I-1 is required to be filed with the Bureau of Engineering and Safety. Once properly lodged for direct use there, no possible objection is perceivable or argued precluding concomitant use of the information contained therein for the appropriate purposes of any other agency in the Department.

In reaching the foregoing conclusions we have been guided by fairly recent pronouncements of this court in analogous circumstances. In both *Grenewicz* v. *Ligham*, 34 N. J. Super. 1 (App. Div. 1955) and *Daughters of Miriam Home* v. *Legalized Games, etc.*, 42 N. J. Super. 405 (App. Div. 1956) it was urged that regulations of administrative agencies were invalid because the Legislature had itself acted on the subject matter of the regulations by direct enactment; in both cases colorable arguments as to inconsistency between the respective statutes and regulations were advanced. But in both the contention was rejected. In the *Grenewicz* case Judge (now Mr. Justice) Francis stated: "The presumption is in favor of conformity [between legislation and regulations] * * *, and a regulation will not be set aside unless it is plainly and palpably inconsistent with the statute." (34 N. J. Super., at p. 9.) To the same effect was the opinion in the *Daughters of Miriam Home* case (42 N. J. Super., at p. 415), where the allegedly conflicting statute was adopted one month prior to adoption of the challenged regulation. The force of these decisions in their present application is augmented when it is considered that in those cases the attack was upon administrative regulations directly affecting substantive property rights whereas here the subject matter consists merely of procedural directives for the filing of informational reports.

Plaintiffs argue that the statutory provisions quoted above authorizing adoption of rules and regulations by

the Commissioner of Labor and Industry in fairly general terms are void for lack of standards specifying the type and scope of administrative rules to be adopted. Plaintiffs cite no New Jersey case wherein *procedural* rules like these adopted by an administrative agency under legislative authorization to adopt such rules and regulations as are necessary for the enforcement of the act administered by the agency have been held void for lack of standards in the statute; nor cases where the statute authorized adoption of rules "for the efficient conduct of the work and general administration of the department," etc. or similar phraseology. On the other hand, a comparably couched delegation of power was sustained as adequate in *Grenewicz* v. *Ligham, supra* (34 N. J. Super., at p. 9), citing *Jamouneau* v. *Harner,* 16 N. J. 500 (1954). *Cf. State* v. *Board of Chosen Freeholders of Bergen County* (Sup. Ct., decided June 29, 1962).

In the ebb and flow of the delegation doctrine down the years, both state and federal cases are to be found to sustain or destroy almost any type of legislative delegation of rule making authority to an administrative agency. But the modern and preferred approach is in favor of flexibility and liberality insofar as standards for delegation are concerned while exerting close judicial supervision over fairness of adjudicative procedures. See *Gellhorn and Byse, Administrative Law, Cases and Comments* (1954), p. 99, *et seq.* In 1 *Davis, Administrative Law* (1958), §2.15, p. 150, it is stated:

> "The direction of movement of the law of delegation is clear. In the federal courts, nothing but a congressional abdication or clear abuse is likely to be held an invalid delegation. One state court declared in 1956: 'The modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as

> the complexity of governmental and economic conditions increases.' Too many courts remain unaware of this 'modern tendency.' "

And see *Yakus* v. *United States*, 321 U. S. 414 (1944) and *Lichter* v. *United States*, 334 U. S. 742 (1948), in the light of which, in the opinion of competent students, the famous decisions in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935) and *Schechter* v. *United States*, 295 U. S. 495 (1935), stressed by present plaintiffs, are apt to wither on the vine as authorities inimical to delegative flexibility. See *Gellhorn and Byse, op. cit., supra*, p. 114.

In *Ward* v. *Scott*, 11 N. J. 117, 123 (1952) the court said: "Nor are we restricted to the ascertainment of standards in express terms if they may be reasonably implied from the entire act." As similarly expressed in *Lane* v. *Holderman*, 23 N. J. 304, 316 (1957): "the context of the act and its imbedded objective may be considered in determining whether or not the administrator's discretion is constitutionally circumscribed." So, too, here. As an example, the provisions of the workmen's compensation act mandating conscientious protection by the Division of Workmen's Compensation of the specified rights of injured workers reasonably imply a standard and policy which may be administratively implemented by procedural regulations concerning reporting of accidents which are demonstrably servient to the more efficient execution by the agency of such statutory policy.

The peculiar significance of the factors of the continuousness of the administrative character of the agency involved and the character of the regulation as substantive or procedural was noted by the court in *Van Riper* v. *Traffic Tel. Workers' Fed. of N. J.*, 2 N. J. 335 (1949). It was stated there was greater need of specific standards in cases of delegation of power to *ad hoc* labor arbitration boards than "there would be in the case of a continuous

administrative body which might gather experience as it went along" (at p. 353); also, "standards of delegation are peculiarly required * * * where the legislature is enacting a new pattern of social conduct" (at p. 354).

We find the legislative delegation of rule-making power here in accord with constitutional principle.

Plaintiffs also attack the adequacy of the final factual findings and conclusions of the Commissioner. While they could serviceably have been more detailed in some respects, we deem them adequate for present purposes. Moreover, it cannot be said that specificity of factual findings is as imperative in respect of hearings attendant upon the administrative adoption of quasi-legislative rules of general application as where the adjudicatory function of the agency is involved. See our prior opinion in this matter (54 N. J. Super., at p. 266). This is particularly true where the administrative product consists of procedural rather than substantive rules. In any case, the fairness of approach of the Commissioner in this matter is manifested not only by his liberality in interpretation of our prior order concerning the scope of the proofs to be admitted on behalf of plaintiffs, but also by his receptivity to a number of criticisms advanced by plaintiffs as reflected in the regulations as finally promulgated at the conclusion of the hearings.

Plaintiffs candidly admit in their brief that "their resistance to a recasting of accident reporting sprung in part from a demonstrable conviction that the forms would be used to produce more claims and to edge up the claims already made." They submit a "Brandeis" style brief, much of which is an attempted demonstration that the act is being deliberately administered for the purpose of instigating claims by satisfied employees and of producing excessive and illegal settlements and awards in favor of injured workers; that New Jersey industry cannot afford

the burden of the cost of workmen's compensation as so administered and that the forms here involved have been devised with the objective of further improper aggrandizement of the allowances to workers at the expense of industry and insurance carriers. To the extent that this represents an attack upon the *bona fides* of the Department in adopting these regulations, we find the assault unjustified. The other representations advanced do not belong in a brief of legal argument on the *validity* of the regulations. They are appropriately to be addressed to the Legislature, the Executive, or the electorate.

More pertinently, plaintiffs also argue that their proofs before the Commissioner establish that the use by the various agencies in the Department of the accident report forms in the past has been so minimal as to suggest that there is no demonstrable bona fide purpose or intent, or reasonable necessity, to use the information to be provided by the new forms for the purported purposes (accident prevention, rehabilitation, etc.). Proofs purporting to show the comparative uselessness of any attempts at such uses were also adduced. In the light thereof, it is argued, the considerable additional expense and inconvenience which the revised reporting will cast upon the reporting companies impels the conclusion that the whole program is so arbitrary and unreasonably burdensome on employers and insurers as to justify judicial nullification.

We have read the proofs relative to the foregoing contentions with interest. However, we deem the argument substantially one involving policy considerations for resolutions by the administrator of the agency, not by the court, in the absence of a showing of arbitrariness or unreasonableness not here demonstrated. As to the use to be made of the forms, the present Commissioner avows an intent to have greater recourse to this information in the future than has been the case under his predecessors in the past.

We must accord his representations the presumption of good faith. As to the cost of compliance by plaintiffs, considering that systematic reporting of accidents has always been the practice in this State, we cannot find that the added expense of compliance with the new regulations is so excessive that, in the light of the *prima facie* showing of the reasonableness of the requirements and our satisfaction in all other respects with their legality, we would be warranted in holding them invalid on that ground.

II

We turn to the second basic objection of plaintiffs to the forms—the requirements as to furnishing of medical information and diagnoses, particularly to the injured worker. As originally proposed, new form WC-5 would have required the employer or insurance carrier to report to the Division *and* to the injured employee *detailed* medical diagnoses and x-ray findings. As a result of objections by employer and insurance representatives prior to the final promulgation of the forms by Commissioner Holderman, there was a modification permitting the information to be supplied the employee to be in *general* terms, both as to diagnoses and x-ray findings. During the hearings before Commissioner Male great stress was laid by plaintiffs' medical witnesses on the harmful psychological effect which direct receipt of raw medical information might have in many cases on injured workers. To meet this consideration, without sacrificing the aim of fair apprisal of the injured worker of the nature of his injury so that he might more intelligently decide what his claim was worth for settlement or award purposes, the regulation was modified upon final adoption after the hearings. Provision is made on the form for permitting the reporter to inform the employee that a physician of his choice may obtain medical information if the physician writes to the Division. As a

prerequisite, the employer's doctor must recommend in writing that the employee not receive the data.

Concerning the continued requirement that detailed x-ray findings and detailed medical diagnoses be filed with the Division, the Commissioner found as a fact that all plaintiffs "regularly receive such information in compensable cases" and that "this information is essential for the proper exercise of rehabilitation services and the conduct of the Direct Settlement Review Program in the Division of Workmen's Compensation." We find these conclusions supported by the proofs.

The relevance between the requirement that information of the type described should go to the Division and the injured employee and the proper administration of the workmen's compensation act is obvious. As a practical matter, medical treatment of industrial injuries is in the first instance provided most often by medical and nursing personnel engaged by the employer. The statute requires that the employer render medical treatment to the employee, R. S. 34:15-15, and the economic circumstances of the injured workman generally impel his accepting treatment by the "company doctor" even after first aid of the immediate condition produced by an accident. What the presently challenged rules provide is in the nature of discovery for the benefit of the worker of information generally highly material to the question of the extent of his injury and the degree of its permanence, if any, and thus to the fairness and adequacy of any award for or settlement of the claim. The information is peculiarly within the possession or control of the employer; the Division needs it in order efficiently and fairly to review or negotiate settlements; the workman (or his attorney) needs it to exercise sound judgment in relation thereto or in prosecution of a formally litigated claim.

As to the statutory authority of the Commissioner to require such information and the transmittal thereof to

the employee, everything stated in *I* of this opinion is here also pertinent. In addition, there is the buttressing statutory provision in R. S. 34:15-100, quoted above, that the employer or insurance carrier shall, when directed so to do, file with the workmen's compensation bureau copies of such medical certificates or reports which it may have on file. We do not regard the specific requirements of the regulations under review as violative of or inconsistent with this section, within the applicable interpretive principles, favorable to administrative regulation, discussed in *I, supra*. Rather do we regard the express statutory provision as indicative of a general legislative attitude in accord with the object of the regulations. Here, too, the fact that the requirement is of a procedural and remedial, rather than substantive character, conduces toward liberality in sustaining it.

As in the case of the objections to the filing by self-insured employers of form L&I-1, plaintiffs strongly attack the reasonableness of the requirement for furnishing medical information. Stress is laid on the cost and inconvenience thereof to the reporting employers and insurers as well as on the unwisdom of permitting employees to have such information. Our reactions to these contentions are the same as to the similar policy and expense pleas made by plaintiffs in respect of form L&I-1. We find no arbitrariness, but, on the contrary, a good deal of rational justification for this aspect of the challenged regulations. We recognize, as did the Commissioner, that there are counter-considerations, in terms of the welfare of injured workers, in permitting them to have raw medical diagnoses in certain types of ailments without the protective screen of the patient's own physician. However, this consideration does not apply to every kind of injury or ailment. Moreover, some amelioration of potential harm is provided by the last revision of the regulation. In the last analysis, however, the weighing of the policy considerations *pro* and *contra* is for the expert judgment of the administrator.

We cannot say that his conclusion in this instance is arbitrary or unreasonable.

Finding all of the regulations, so far as challenged herein, to be valid and free from the legal objections leveled against them by plaintiffs, we adjudicate them to be valid, lawful and subsisting in all respects and direct that the stay against their enforcement be vacated forthwith.

Opinion.

SUPREME COURT OF NEW JERSEY,

DOCKET NO. 3928.

ESSO STANDARD OIL COMPANY, *et al.*,
Plaintiffs,

vs.

CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY, *et al.*,
Plaintiffs,

vs.

CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY, *et al.*,
Plaintiffs,

vs.

RAYMOND F. MALE, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

Civil Action.
Opinion.

Argued February 18, 1963—Decided March 4, 1963.

Per Curiam. The judgment is affirmed for the reasons expressed in the opinion of Judge Conford in the Appellate Division.

Judgment.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-60-58; A-68-58; A-995-59

ESSO STANDARD OIL COMPANY, *et al.*,
Plaintiffs,

vs.

CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey, Defendant.

NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY, *et al.*,
Plaintiffs,

vs.

CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey, Defendant.

NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY, *et al.*,
Plaintiffs,

vs.

RAYMOND F. MALE, Commissioner, Department of Labor and Industry, State of New Jersey, Defendant.

Civil Action.
Judgment.

This matter having been opened to the Court by Theodore I. Botter, First Assistant Attorney General, for Arthur J. Sills, Attorney General of New Jersey, representing the Commissioner of Labor and Industry of the State of New Jersey, for the entry of judgment in accord-

ance with the written opinion of this Court, and the Court in said written opinion having determined that the regulations heretofore promulgated by Carl Holderman, Commissioner, Department of Labor and Industry, as modified after the hearings on remand by his successor in office, Commissioner Raymond F. Male are valid, lawful and subsisting in all respects, and for good cause shown;

It Is on this 24th day of September, 1962,

Ordered that any stay heretofore entered herein against the enforcement of the regulations shall be and the said stay is hereby vacated; and it is further

Ordered that the said regulations as finally promulgated by the Commissioner of Labor and Industry are and they are hereby adjudicated to be valid, lawful and subsisting in all respects and accordingly judgment is hereby entered in favor of defendant and against plaintiffs without costs.

/s/ Milton B. Conford, S. J. A. D.

We hereby consent to the foregoing order solely as to the form thereof, but plaintiffs reserve the right to apply for a further stay of the regulations in question.

Wharton, Stewart & Davis

By: John W. Fritz
A Member of the Firm

New Jersey Manufacturers Casualty Insurance Company and Mitchell-Bissell Company

By: Edward B. Meredith

Arthur J. Sills
Attorney General of New Jersey

By: Theodore I. Botter
First Assistant Attorney General

Mandate on Affirmance.

SUPREME COURT OF NEW JERSEY,

ESSO STANDARD OIL COMPANY, *et al.*,
Plaintiffs,
vs.
CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY, *et al.*,
Plaintiffs,
vs.
CARL HOLDERMAN, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

NEW JERSEY MANUFACTURERS CASUALTY INSURANCE COMPANY, *et al.*,
Plaintiffs,
vs.
RAYMOND F. MALE, Commissioner, Department of Labor and Industry, State of New Jersey,
Defendant.

Appeal Docket No. 3928.

Civil Action. On Appeal.

Mandate on Affirmance.

This cause having been duly argued before this Court by Mr. John W. Fritz and Mr. Edward B. Meredith, counsel for the appellants and Mr. Theodore I. Botter, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is affirmed with costs; and it is further ordered that this mandate

shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the fourth day of March, 1963.

/s/ JOHN H. GILDEA
Clerk

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Clerk of the Supreme Court

FILED
Mar 4 1963

JOHN H. GILDEA
Clerk

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Order Denying Petition for Rehearing.

SUPERIOR COURT OF NEW JERSEY

ESSO STANDARD OIL COMPANY, *et al.*, Plaintiffs-Appellants, *vs.* CARL HOLDERMAN, Commissioner, Defendant-Respondent.	Docket No. 3928 On petition for rehearing.

This matter having been duly presented to the Court, and no justice who voted with the majority having moved a reconsideration, it is Ordered that the petition for rehearing is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twenty-fifth day of March 1963.

/s/ JOHN H. GILDEA
Clerk

FILED
Mar 25 1963

John H. Gildea
Clerk